No. 479

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In point I of its brief in opposition, respondent contends that the petition was not filed in time and that this Court therefore has no jurisdiction to entertain the petition.[1] The basis for the contention is that the judgment of the court of appeals sought to be reviewed was entered on July 5, 1951, and not, as stated in the petition for certiorari, on September 18, 1951. We submit, to the contrary, that the court of appeals made its judgment of September 18, 1951, its final judgment in the proceeding pending before it, and

[1] The Government considers that the other two points in the brief in opposition are adequately presented in its petition and require no further comment.

that the entry of this judgment fixed the time within which the petition for certiorari might be filed.

The substantive prohibitions of the Commission's order are set forth in three paragraphs or parts, designated I, II, and III (R. 2263–2264). Respondent's petition to review challenged the entire order (R. 2284, 2288), and the Commission, by cross petition, sought enforcement of the entire order.[2] During the court proceedings respondent abandoned its challenge to Parts I and II of the order, but such abandonment did not eliminate the issue before the court as to the judgment to be entered with respect to Parts I and II.

The opinion which the court rendered on July 5, 1951, discussed only Part III of the Commission's order (R. 2308–2315). The court stated that, since respondent was not challenging Parts I and II, it would "make no further reference to them" (R. 2308). On the day on which the opinion was filed the court entered an order which reversed Part III of the "decision" of the Commission, but was silent as to Parts I and II of the order (R. 2316). The court therefore left undetermined what judgment should be entered with re-

[2] While the cross-petition was not incorporated in the printed record filed with this Court, the final decree entered by the court below on September 18, 1951, recites that the Commission had filed a cross-petition praying for enforcement of its order against respondent (R. 2317).

spect to this portion of the order. This issue was before the court not only because of the cross petition filed by the Commission, but also because the court had the duty to affirm, modify, or set aside the order brought before it for review.[3] Parts I and II of the Commission's order were not affirmed, modified or set aside by the judgment entered on July 5, 1951, and this judgment was therefore not dispositive of the review proceeding.

The Commission, being of the opinion that the court's order of July 5, 1951, was not final, filed with the court a memorandum dated August 21, 1951, requesting entry of a judgment affirming and enforcing Parts I and II of its order,[4] Fol-

[3] Part I of the Commission's order was grounded on Section 5 of the Federal Trade Commission Act, Part II on Section 3 of the Clayton Act, and Part III on Section 2 of the Clayton Act (R. 2284–5). Section 5 (c) of the former Act (15 U. S. C. 45 (c)) and Section 11 of the latter Act (15 U. S. C. 21), the statutory basis for the review proceeding (R. 2286), made it the duty of the court, on review, to enter a judgment "affirming, modifying, or setting aside" the order of the Commission.

Section 5 (c) of the Trade Commission Act requires the court to enter a decree "enforcing" the order under review "to the extent that such order is affirmed." And in review proceedings under Section 11 of the Clayton Act, the general practice has been to enforce orders of the Commission to the extent that they are affirmed. See petition for certiorari in *Federal Trade Commission* v. *Ruberoid Co.*, No. 448, this Term, certiorari granted January 28, 1952.

[4] The memorandum is entitled "Statement of the Position of the Federal Trade Commission Relative to Settlement of a Final Decree Herein." A copy of this memorandum, which is not a part of the record, has been filed with the Clerk.

lowing the filing of an opposing memorandum by respondent and a reply to this memorandum by the Commission, the Court on September 18, 1951, entered a judgment which it captioned "Final Decree" (R. 2316). The judgment recites the prior proceedings in the case, including the cross petition filed by the Commission (R. 2316–2317). It recites that it appears to the court that Parts I and II of the Commission's order should be "affirmed and enforced" and that Part III should be "reversed" (R. 2317). The judgment then provides: "Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed" that Part III of the order "be and the same is hereby reversed" and that Parts I and II "be and the same hereby are affirmed" (*ibid.*).[5]

1. A court has plenary power while the term is in existence to modify or vacate its judgment. *Zimmern* v. *United States*, 298 U. S. 167, 169–170. In the instant case, if the judgment entered on September 18 had vacated the judgment of July 5, the September 13 judgment would plainly govern on time for filing petition for certiorari. We submit that it is clear that the court below intended that its later judgment of September 18 should supersede its earlier, incomplete judgment.

[5] In addition, the judgment incorporates the prohibitions of Parts I and II of the Commission's order, and decrees that respondent file with the Commission within 90 days a written report setting forth its compliance with the judgment (R. 2317–2319).

If this had not been the case the later judgment would merely have affirmed and enforced Parts I and II of the Commission's order, and recited the reversal of Part III by the judgment entered in July. Instead, the later judgment not only affirmed and enforced Parts I and II, but also specifically reversed Part III. The court manifested its intention to make the September 18 judgment the court's final judgment as to Part III, both by providing therein for reversal of Part III and by denominating this judgment "Final Decree." Where the date of entry of final judgment is in doubt, the court's intention as to the act constituting its final judgment in the cause is controlling. *United States* v. *Hark*, 320 U. S. 531, 535. Here, as in the *Hark* case, it is not to be assumed that the court entered a formal order intended to be merely "an empty form" (*ibid.*). The court's reversal of Part III by the judgment entered on September 18, 1951, obviously was an empty form if the court intended its July 5 order to stand as its judgment as to Part III. See *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (C. A. 6), quoted at pages 8–9, *infra*.

2. The fact that the court entertained and acted upon the application made by the Commission (dated August 21, 1951) for entry of a judgment dispositive of the proceeding is in itself sufficient to make the September 18 judgment the court's final judgment as to all parts of the Commission's

order. It is well settled that "where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177. While such motion or petition does not have this effect if it is "addressed to mere matters of form" and does not raise "questions of substance" (*Leishman* case, p. 205), it is clear that the Commission's application raised a question of substance, since it asked that the court enter judgment with respect to Parts I and II of the Commission's order.

In this case, the Commission's application was not filed within the 15 days allowed for petitions for rehearing. But it did induce the court to revise the judgment in matters of substance. An untimely petition for rehearing or to amend a judgment, if entertained or considered on its merits, has the same effect as a timely petition. *Bowman* v. *Loperena*, 311 U. S. 262, 266, and cases cited; cf. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 150. In these circumstances, "the judgment of the court as originally entered does not become final" until the action of the court on such petition, "and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, *supra*. In the *Bowman* case and each

of the three cases it cites the untimely petition for rehearing, although considered by the lower court, was denied. The problem presented in those cases was therefore more difficult than that raised here, in which the application to change the judgment was successful. It follows *a fortiori* in the latter situation that the entry of a different judgment extends the time to appeal.

Indeed, the general rule in this country (subject to an exception for clerical or formal errors) is "that where a judgment, order, or decree is amended or modified the time within which an appeal from such determination may be taken begins to run from the date of the amendment or modification." Annotation, 80 Law Ed. 1121, and cases cited. Federal cases include *United States* v. *Gomez*, 1 Wall. 690, 700; *Memphis* v. *Brown*, 94 U. S. 715, 718; *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689, 690 (C. A. 6); cf. *Zimmern* v. *United States*, 298 U. S. 167.

3. Respondent's principal contention is based on the facts that the judgment of September 18 did not alter the provisions of the earlier order of July 5 insofar as Part III of the Commission's order was concerned, and that the Commission's petition in this case relates only to Part III. But if a new judgment is entered, the time for appeal is extended with respect to all its provisions, and not merely those which have been changed, or with respect to which the petition

for rehearing is filed. If the question were open, wise judicial policy would dictate such a result, in view of the undesirability of piecemeal and separate appeals in what is essentially a single case. But the question is not open, although there seems to have been so little doubt about it that the answer has been assumed without explanation. Thus, in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177, the *plaintiff's* time to appeal was held to be extended by the *defendant's* motion to amend the findings—although the amendments to the findings did not relate to the portion of the judgment from which the plaintiff was appealing.[6] It has also been held that the entry of a new judgment supersedes the old even though there is no change of substance. In *Memphis* v. *Brown*, 94 U. S. 715, 718, the Court said:

> the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a *supersedeas*.

See also *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (C. A. 6), in which the court said (p. 690):

[6] Similarly, in *Johnson* v. *Eisentrager*, 339 U. S. 763, the Government's petition for certiorari was filed within 90 days of the denial of *respondent's* petition for rehearing below, not within 90 days of the original order.

> The order of March 18 did not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject-matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order.

Clearly where the new order was the same as the old, the appeal must have been from provisions which were repeated without change, as in the instant case.

State cases applying the general rule and holding or implying that a modification of a judgment extends the time to appeal from all portions of the judgment include *Hewey* v. *Andrews*, 82 Or. 448, 159 P. 1149; *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477; *Luck* v. *Hopkins*, 92 Tex. 426, 49 S. W. 360.

4. Respondent argues that the Commission did not file a petition for rehearing or request any change in the judgment as to Part III. The title of the document filed is, of course, immaterial. In any event, the critical fact is that the court actually entered a new and different[7] judgment, not what the Commission requested or the name of the paper in which the request was made. The nature of the application is irrelevant when the judgment is changed—although it may be ma-

[7] Many of the authorities cited above indicate that even if the judgment had not been different the result would be the same so long as a new judgment was entered.

terial when such an application is denied. A new judgment would be the basis for appeal if the court acts on its own motion (*Zimmern* v. *United States*, 298 U. S. 167), and the result must be the same irrespective of a formal or informal request by a party.

For the reasons stated, it is respectfully submitted that the petition for certiorari was filed within the statutory 90-day period and that the Court has jurisdiction to entertain the petition.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY, 1952.

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